

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

ALLEN KREKE, individually and on behalf of
others similarly situated,

Plaintiff,

v.

LIBERTY POWER HOLDINGS LLC,
a Delaware limited liability company,

Defendant.

C. A. No. 3:17-cv-808

Class Action
Jury Trial Demanded

CLASS ACTION COMPLAINT

Plaintiff Allen Kreke (“Plaintiff”), by his attorneys, The Simon Law Firm, P.C., states as follows for his Class Action Complaint against Liberty Power Holdings LLC (“Defendant”).

NATURE OF THE CASE

1. This is a consumer class action based upon Defendant’s violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”). Defendant called Plaintiff and other putative class members on their cellular telephone lines using an artificial or prerecorded voice without their prior express consent and called Plaintiff and other putative class members on their cellular telephone lines more than once in a 12 month period despite those lines being on the national Do Not Call registry. Defendant willfully chose to ignore compliance with the TCPA. As such, Defendant willfully inundated Plaintiff and other putative class members with illegal telemarketing calls.

PARTIES

2. Plaintiff is an individual who resides in this district.

3. Defendant is a Delaware limited liability company with its principal place of business in Ft. Lauderdale, Broward County, Florida.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as the action arises under the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., which is a federal statute. Furthermore, jurisdiction is proper under the Class Action Fairness Act, 28 U.S.C. § 1332(d) et seq. because, on information and belief, the Class consists of over 100 people, at least one member of the Class is from a State other than Illinois, and the amounts in controversy are over \$5,000,000. Further, none of the exceptions to CAFA jurisdiction apply.

5. Venue is proper in the United States District Court for the Southern District of Illinois pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims occurred in this judicial district.

COMMON ALLEGATIONS OF FACT

6. Defendant supplies retail electricity to residential, business and government customers. Founded in 2001, by CEO David Hernandez, “after separating from Enron in 2001,”¹ and current President Alberto Daire,² Defendant claims to currently serve “hundreds of thousands of customers across the nation.”³

7. Defendant claims to be the largest independent retail electricity provider in the United States, having grown “organically one customer at a time by acting with integrity, building trust, and creating value” for its customers.⁴

¹ <https://www.libertypowercorp.com/message-david-hernandez/> (Accessed July 25, 2017.)

² <https://www.libertypowercorp.com/about-us/history/> (Accessed July 25, 2017.)

³ <https://www.libertypowercorp.com/about-us/video-presentation/> (Accessed July 25, 2017.)

⁴ <https://www.libertypowercorp.com/about-us/history/> (Accessed July 25, 2017.)

8. Unfortunately for consumers, Defendant utilized (and continues to utilize) a sophisticated telephone dialing system to call cellular telephone service subscribers *en masse* to promote and market its services.

9. That is, in Defendant's overzealous attempts to market its services, it placed (and continues to place) phone calls to consumers that never provided consent to call and to consumers with whom it had no prior relationship. Additionally, Defendant placed (and continues to place) repeated and unwanted calls to consumers whose cellular telephones service numbers are listed on the National Do Not Call Registry. Consumers place their phone numbers on the Do Not Call Registry for the express purpose of avoiding unwanted telemarketing calls like those alleged here.

10. Not surprisingly, these practices have led to significant backlash and public complaints from consumers online:

- a. "Your representative was deceptive misleading and misrepresenting when he called me to transfer suppliers His name is Erik Schaaf. He assured me that although the rate looked higher all the other charges relating to delivery would be dropped and that the net result would be a cheaper bill. Obviously an outright lie. I have complained to PURA 1 800 382 4586 [State of Connecticut Public Utilities Regulatory Authority] who are taking this up on my account. I also intend to pursue all social media to let anyone who is interested in Liberty power to check very carefully because there is no morality or true dealing in your sales practices"⁵
- b. "I am a customer of ComEd and not a customer of Liberty Power. I received a call today at 1:18 PM from phone #1-773-36-8882 [sic]. A robot claimed to be calling from ComEd and said if I've paid my bill on time for 6 months in a row and wanted to save 15% on my ComEd bill I should press "1" – so I did. A man who claimed his name was Jason Smith (I highly doubt it) and had a very heavy Indian accent started to talk; [...] He gave me a run around for awhile about being my supplier of fixed energy through ComEd. After much questioning, he finally admitted that he was a supplier to some ComEd customers, and not my supplier and was trying to sell me on joining up with Liberty Power. I explained to him that I was on the federal "Do Not Call List" and that it was illegal for him to call me unless he was a non-profit or

⁵ <https://www.complaintsboard.com/complaints/liberty-power-fraud-and-deception-c853554.html> (Accessed July 25, 2017).

currently doing business with me. I told him I was going to report this breach and asked him to take me off his calling list. I spoke firmly but professionally. He responded exactly this way ... "Go f yourself"! and then hung up on me. I want this man fired."⁶

- c. "My question is why was the bill close to or same as original power company? I just got a cold call from Liberty Power Corp (HARD SELL!) and was pressured to enter into a 24 mo contract and save 1/2 what I pay now!"⁷
- d. "I was contacted today by someone from Liberty power. Problem was, they did not mention that until much later in the phone call. They made it sound like they were from the utility company I presently use."⁸
- e. "I got a call and the guy actually talked me into signing..(like an idiot) and I know better! But I did, then 2 days later, realized I better check into it. He flat out lied to me and said Amerens rates were over 8 cnts per KWH and will be going over 10 cts per KWH in June and I better sign up now."⁹
- f. "hmmm they have been calling me daily...."¹⁰
- g. "Liberty energy are ####. They keep bothering my parents - even after I told them to stop. They had the audacity to call after 8:30 at night. I have filed a complaint with Pura in CT."¹¹
- h. "A Liberty Power rep recently called us at our Illinois home at dinnertime. (Call source: 217-693-6030). When I asked the caller to take us off of their calling list, he claimed that Liberty Power didn't maintain a do not call list because this wasn't a "telemarketing call."¹²
- i. "Wow what a joke, calling me yelling at me that I need to use their company to get power. The guy went as far to say that my electric bill lied to me along with the local new. He was so rude, I had to hung up on him but their math makes no sense."¹³

11. Additionally, there has been a public backlash from consumers that have received unwanted telemarketing calls from the same phone number (708-640-8017) that, as alleged herein, was used by Defendant to place a call to Plaintiff's cellular telephone service line:¹⁴

- a. "DAMN. Didn't have my glasses on and squinting thought it said WATSON HOME, so I answered thinking it was Mom or Dad. Recording said if I

⁶ <https://www.complaintsboard.com/complaints/liberty-power-telemarketing-to-people-on-the-do-not-call-list-c806877.html> (Accessed July 25, 2017.)

⁷ <https://www.complaintsboard.com/complaints/liberty-power-c336688.html#comments> (Accessed July 25, 2017.)

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ The consumer complaints listed in Paragraph 14 of this Complaint were accessed online July 25, 2017, from <http://800notes.com/Phone.aspx/1-708-640-8017>. 800notes.com is a free website that provides databases of phone numbers, such as the number used by Defendant to call Plaintiff's cellular telephone service line, that are populated by user generated comments, in order to assist consumers in reporting, investigating and tracking telephone fraud, telemarketers, robo-calling, and the like.

wanted to lower my electric bill, etc. I hung up. It actually said UNKNOWN NAME. Had I had my glasses on, I would have recognized the number, they call here so often. I think the no call list sells numbers so that we buy block call options through carriers. No matter what, there is a scam at some level. LESSON TO ME: don't answer the phone if I can't positively make out the number."

- b. "Idiot, utility company scammers. They called from 3 different phone numbers today...
Caller ID reads: Harvey IL...smh"
- c. "They have called twice now since yesterday. No voicemail left. BLOCKED!"
- d. "Called on my cell phone. Did not answer and no message left."
- e. "Got a call from this number, caller ID says from Harvey, IL. No message left."
- f. "called again today. I did not recognize the number and didn't answer. This is the third call, not all from the same number, today"
- g. "Called cell phone just now. I don't know anyone in 708 area code so did not pick up. Left no message."
- h. "Just got a call from this number no answer. Scam call."
- i. "CID says "Unavailable", no message."
- j. "Got a call from this number ,missed call so I tried calling back ,nothing happened doesn't even ring."
- k. "Scam call about my electric bill with Com Ed. Which I don't have."
- l. "They need to stop calling me."
- m. "They have been calling me daily for weeks. Finally answered the phone, pressed 5 to speak to a real person, asked to be removed from the call list and before I was even done with my sentence they hung up on me."
- n. "From Harvey, IL supposedly, left no msg so scam"
- o. "i am on do not call list; this number call me every week in off business hours. never leave me any message."
- p. "I got a call from 708-640-8017. CID said UNAVAILABLE. It was a recorded voice that wanted to talk to me about my electric bill with Com-Ed. I find that rather comical since I do not have Com-Ed as my electric carrier. Able to lower my rate....da-da-da-da-da. It's amazing that only legitimate businesses have to abide by the DNC list. Scammers seem to get by with most anything."
- q. "Electric power scam? DON'T give any response by pressing a number or talking. That adds your number to multiple scam call lists! The DNC list is not a call blocker and scammers ignore a toothless call list."
- r. "Called again. No message."
- s. "SCAM call - didn't answer - no VM left and then blocked."
- t. "CID said Harvey, IL. Disconnected on second ring."
- u. "Called and I didn't answer. No message left. I have been receiving more calls like this in the last 2 weeks from areas I don't know anyone. Caller ID said Harvey, IL"

- v. "Did not recognize the number, so did not answer. No message left. Caller ID read CELLULAR CALL,"
- w. "Scam utility company offering a scam of a deal on your electric bill. The number displayed on your called ID is now often that of a private individual in your very own neighborhood. The spoofing scammers hope you'll be curious and pick up the phone."
- x. "No message left. Blocked."
- y. "A new record for SPAM callers today. This is the 14th unwanted call and it's still early. Hopefully, this helps anyone who sees this by not wasting your time answering."
- z. "Com ed scam, I never have had com ed for my electric supplier, yet they call me multiple times a day, the do not call list is ignored by the criminals."
- aa. "Spam number"
- bb. "The never ending annoyance of the electric service change telemarketing scam calls continues with the addition of another new spoofed number or burner phone. This number will, 708-640-8017, will be added to the list"
- cc. "Scammers. Don't answer. Middle eastern guy claiming to work for Com Ed. I get a lot of these calls. I finally answered and asked him how did he get my information.... he hesitated to talk. He refused to answer any of my questions and then he hung up."
- dd. "Utility scammers. Lower ComEd bill"
- ee. "Called but left no message"
- ff. "These calls are not coming from ComEd. ComEd does not call people about lowering their electric bill. It is another company trying to get you to switch. I know you said you don't have ComEd. Just letting you know it isn't ComEd."
- gg. "received a call from 708-640-8017. My headset automatically answered (I don't normally answer numbers i don't know). I hung up. I called back. Line would not even ring."
- hh. "Scam call about switching your electric service."
- ii. "Robocall about our ComEd electric bill - however, we don't get our bills from ComEd !"
- jj. "Same as mdb reported. ComEd doesn't even serve our area code."
- kk. "They just called me 3 times in the row! I ignored it twice but on the third time I did pick it up - total scam.
How can they get away with this? And calling 3 times in the row! (there was probably only one second between each call...)"
- ll. "I answered and it was just silent. Most likely a scammer/robocall."
- mm. "Unwanted caller"
- nn. "Just received a call. I missed it and tried calling back. A recording comes on telling me "all circuits are busy"."
- oo. "I told them once....I told them i had turned them into the police. So the next time they call i am going to record them and turn that into the Iockport police commissioner. We are sick of their calls...Com ed does not does not does not call they told me directly....They are scammers"
- pp. "called my cell, no msg. If I don't recognize it I don't answer. Sometimes, even if I do know the number. Leave a msg if you want something."

qq. “Fake, electric company, 'claiming they're Com Ed,' strikes again.
Idiots!
Caller ID reads, Harvey IL”

12. In making calls to consumers’ cell phones without their prior written express consent, Defendant used an autodialer in violation of the Telephone Consumer Protection Act.

13. Furthermore, Defendant calls these consumers who have no “established business relationship” with Defendant and who are registered on the Do Not Call List.

14. Finally, even when consumers try to opt out of future calls by requesting to never be called again, Defendant continues to call them.

15. Defendant has shown a pattern and practice of engaging in deceptive and misleading marketing practices. The State of New York Public Service Commission (“Commission”), for example, instituted proceedings and ordered Defendant to show cause “why it should not be precluded from enrolling new customers until the Commission orders otherwise,” due to the “hundreds of customer complaints about the marketing practices” of Defendant.¹⁵ The majority of complaints received by the Commission were that Defendant (1) engaged in misleading marketing practices; (2) that its sales representatives misrepresented their identity; and (3) that it “slammed” customers, that is, enrolled customers without authorization.

16. Subsequently, the Commission ordered Defendant to suspend certain sales pending the development of “longer term solutions to address [Defendant’s] marketing problems.”¹⁶ At the time, the Commission’s move against Defendant was praised by consumer advocates and Defendant’s regional competitor Con Ed.¹⁷

¹⁵ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B80BD8A5F-A162-4CA9-8DF3-13B34885E92F%7D> (Accessed July 25, 2017.)

¹⁶ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B8E574963-D4FF-4893-B2A3-F832D5AC6606%7D> (Accessed July 25, 2017.)

¹⁷ <http://nypost.com/2013/03/14/state-to-crack-down-on-deceptive-electricity-seller-officials/> (Accessed July 25, 2017.)

17. In making the phone calls at issue in this Complaint, Defendant and/or its agent utilized an automatic telephone dialing system. Specifically, the hardware and software used by Defendant (or its agent) has the capacity to store, produce, and dial random or sequential numbers, and/or receive and store lists of telephone numbers, and to dial such numbers, *en masse*, in an automated fashion without human intervention. Defendant's automated dialing equipment includes features substantially similar to a predictive dialer, inasmuch as it is capable of making numerous calls simultaneously (all without human intervention).

18. Defendant knowingly made (and continues to make) telemarketing calls without the prior express consent of the call recipients and knowingly continues to call them after it receives requests to stop. As such, Defendant not only invaded the personal privacy of Plaintiff and members of the putative Class but also intentionally and repeatedly violated the TCPA.

FACTS SPECIFIC TO PLAINTIFF

19. Prior to May 15, 2017, Plaintiff registered his cellular telephone number on the National Do Not Call registry to try to avoid receiving unsolicited telemarketing calls on his cell phone.

20. On May 15, 2017, at 10:58 a.m., Plaintiff received a telemarketing sales call from Defendant, or on Defendant's behalf, on his cellular telephone line, from the phone number 708-640-8017. This telephone number is notorious for belonging to Defendant and for being used for telemarketing, in violation of the TCPA. *See, supra*, ¶ 11. A partially redacted screen shot of Plaintiff's cell phone call log, taken on May 15, 2017, is attached as Exhibit B.

21. In order to ascertain exactly who was calling his cell phone to solicit him, Defendant engaged in conversation with Plaintiff over his cell phone. Plaintiff went through

Defendant's process, answered Defendant's questions concerning whether he owns a home and from whom he purchases electricity, and listened to Defendant's sales proposal.

22. As there was no prior or current relationship between Plaintiff and Defendant, Defendant did not know anything about Plaintiff until Plaintiff chose to share certain personal information on the phone call. Plaintiff, for example, provided Defendant with his name and mailing address and agreed to receive a sales contract through the mail. Defendant stated on the phone call that it would be sending a sales contract through the mail to Plaintiff.

23. Plaintiff then received, via the mail, a letter, signed by Defendant's CEO David Hernandez, and a "Welcome Kit" that included a contract entitled "LIBERTY POWER UNIFORM DISCLOSURE STATEMENT/CONTRACT SUMMARY – Illinois – Residential – Green (Wind)." The letter and contract are attached as Exhibit A to this Class Action Complaint.

24. The letter from Defendant stated that Defendant was "pleased to welcome [Plaintiff] to the Liberty Power family!" and stated that Defendant had "already coordinated with [Plaintiff's] utility to ensure [Plaintiff's] transition is simple and worry free." *See* Exhibit A.

25. Defendant's intentional violation of the TCPA in, for example, making a call to Plaintiff's cellular telephone line, without Plaintiff's prior express consent, using an automatic telephone dialing system, was rewarded by contact with Plaintiff (a potential customer), obtaining Plaintiff's personal information, and Plaintiff's acceptance of marketing materials and a contract from Defendant through the mail.

26. Defendant is and was aware that the above-described cellular telephone call was and is being made to consumers like Plaintiff who had not consented to receive them and whose telephone numbers were registered with the National Do Not Call Registry.

CLASS ALLEGATIONS

27. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2) and (b)(3) on behalf of himself and the proposed Class as defined as follows:

All persons in the United States who from July 28, 2013, to the present (1) Defendant caused to be called using an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice; (2) on the person’s cellular telephone service number; (3) not for emergency purposes; and (4) for whom Defendant had not obtained the prior express consent to call the person.

28. The following people are excluded from the Class:

(1) any Judge or Magistrate presiding over this action and members of their families; (2) Defendant, Defendant’s subsidiaries, parents, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and its current or former employees, officers and directors; (3) persons who properly execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff’s counsel and Defendant’s counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons. Plaintiff anticipates the need to potentially amend the class definitions following discovery into the scope of the class and the identity of any other persons who should be included as party defendants.

29. **Numerosity:** The exact size of the Class is unknown and not available to Plaintiff at this time, but it is clear that individual joinder is impracticable. On information and belief, Defendant made calls to thousands of consumers who fall into the definition of the Class. Members of the Class can be identified through reference to objective criteria, including Defendant’s (or Defendant’s agent’s) business records, consumer phone records, and other evidence to be gained in discovery.

30. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Classes include, but are not necessarily limited to the following:

a. Whether Defendant’s conduct violated the TCPA;

- b. Whether Defendant systematically made calls to persons' cellular telephone service numbers who did not previously provide Defendant with their prior express consent to receive such phone calls;
- c. Whether Defendant made the calls with the use of an ATDS or an artificial or prerecorded voice; and
- d. Whether members of the Class are entitled to treble damages based on the willfulness of Defendant's conduct.

31. **Typicality:** Plaintiff's claims are typical of the claims of other members of the Class. Plaintiff and members of the Class suffered essentially identical harm and sustained damages as a result of Defendant's uniform wrongful conduct during transactions with Plaintiff and the Class.

32. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class and has retained counsel competent and experienced in complex class actions. Plaintiff has no interest antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff.

33. **Policies Generally Applicable to the Class:** This class action is appropriate for certification because Defendant has acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class members and making final injunctive relief appropriate with respect to the Class as a whole. Defendant's practices challenged herein apply to and affect the Class members uniformly, and Plaintiff's challenge of those practices hinges on Defendant's conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiff.

34. **Superiority:** This case is also appropriate for class certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy given that joinder of all parties is impracticable. The damages suffered by the individual members of the Class will likely be relatively small, especially given the burden and expense of individual prosecution of the complex litigation necessitated by Defendant's actions. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Defendant's misconduct. Even if members of the Class could sustain such individual litigation, it would still not be preferable to a class action, because individual litigation would increase the delay and expense of all parties due to the complex legal and factual controversies presented in this Complaint. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court for the Class. Economies of time, effort and expense will be fostered and uniformity of decisions ensured.

FIRST CAUSE OF ACTION
Violation OF 47 U.S.C. § 227(b) et seq.
(On behalf of Plaintiff and the Class)

35. Plaintiff incorporates herein by reference paragraphs 1-34.

36. 47 U.S.C. § 227(b)(1)(A)(iii) makes it unlawful for any person

to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service...or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.

37. Defendant made unsolicited and unwanted telemarketing calls to cellular telephone service numbers belonging to Plaintiff and the other members of the Class, without their prior express written consent, in an effort to sell its products and services.

38. Defendant did not have the prior express consent of Plaintiff and other members of the Class to make these telephone calls.

39. None of the calls made by Defendant to Plaintiff and other members of the Class were initiated for emergency purposes or exempted by rule or order of the Federal Communications Commission.

40. Defendant made the telephone calls using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and/or receive and store lists of phone numbers, and to dial such numbers, *en masse*.

41. Defendant utilized equipment that made the telephone calls to Plaintiff and other members of the Class simultaneously and without human intervention.

42. By making unsolicited telephone calls to Plaintiff and members of the Class's cellular telephones without their prior express consent, and by utilizing an ATDS, Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii).

43. As a result of Defendant's unlawful conduct, Plaintiff and the members of the Class suffered actual damages in the form of monies paid to receive the unsolicited telephone calls on their cellular phones and, under Section 227(b)(3)(B), are entitled to, *inter alia*, a minimum of \$500 in damages for each such violation of the TCPA.

44. Should the Court determine that Defendant's conduct was willful and knowing, the Court may, pursuant to Section 227(b)(3), treble the amount of statutory damages recoverable by Plaintiff and the other members of the Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for the following relief:

1. An order certifying the Class as defined above, appointing Plaintiff as the representative of the Class and appointing their counsel as Class Counsel;
2. An award of actual and statutory damages;
3. A declaration that Defendant used an ATDS under the TCPA and that Defendant made autodialed calls Plaintiff's and members of the Class's cellular telephones without their prior express consent;
4. An injunction requiring Defendant and its agents to cease all unsolicited telephone calling activities and otherwise protecting the interests of the Class;
5. An award of reasonable attorneys' fees and costs; and
6. Such other and further relief that the Court deems reasonable and just.

JURY DEMAND

Plaintiff requests a trial by jury of all claims that can be so tried.

Respectfully Submitted,

ALLEN KREKE, individually and on behalf of all
others similarly situated,

By: s/Anthony G. Simon

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